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Supreme Court, U. S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MATTHEW MASELLI,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF CONNECTICUT

SUE L. WISE
JOHN R. WILLIAMS
Williams & Wise
265 Church Street
New Haven, Conn.
(203) 562-9931

Counsel for Petitioner

November , 1980

QUESTIONS PRESENTED

1. In a murder trial in which the defendant is the sole witness to the killing and in which the defendant's testimony is crucial to the sole issue of self-defense, does a jury instruction to "consider the importance to the accused of the outcome of the trial" and to consider the defendant's "obvious interest in the verdict," unconstitutionally discredit the testimony of the defendant, undermine the presumption of innocence, and violate the Due Process Clause of the Fourteenth Amendment?

2. In a murder case where the defendant is convicted of the lesser included offense of first degree manslaughter, an essential element of which is the specific intent to cause serious physical injury, does the jury instruction, "every person is presumed to intend the natural and necessary consequences of his acts," deny the defendant due process of law and conflict with this Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1979)?

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NO.

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STATE OF CONNECTICUT,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Matthew Maselli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of Supreme Court of the State of Connecticut entered in this proceeding on August 12, 1980.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported in Vol. XLII Connecticut Law Journal, No. 7, August 12, 1980, pp. 15-19 and appears in the Appendix hereto. The judgment of the Superior Court of the State of Connecticut appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on August 12, 1980. A timely motion to re-argue was denied on September 18, 1980, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES,

AMENDMENT XIV:

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

CONNECTICUT GENERAL STATUTES,

SECTION 53a-54a(a):

Sec. 53a-54a. Murder defined. Affirmative defenses. Evidence of mental condition. Classification. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

SECTION 53a-55:

Sec. 53a-55. Manslaughter in the first degree: Class B felony. (a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

STATEMENT OF THE CASE

On December 10, 1975 John Keller was shot and killed by Matthew Maselli. Maselli was indicted by a grand jury for the crime of murder in violation of §53a-54a of the General Statutes of Connecticut.

At a trial to a jury, defendant Maselli, petitioner herein, admitted killing Keller, but claimed that he had fired a thirty-two caliber pistol at Keller to save his own life. Maselli, who was the only witness to the shooting, took the stand in his own behalf. Maselli testified, and evidence was introduced which corroborated his claim, that he called a cab to drive him from Stratford to Fairfield in the early morning hours of December 10; that he told the driver, Keller, who was a stranger to him, that he was a policeman in order to persuade Keller to drive on the Merritt Parkway where cabs were not permitted; that a discussion about firearms ensued; and that Keller said he carried a .44 magnum in the cab; and that Maselli told Keller that he was armed with a .32 pistol. Maselli claimed that the shooting occurred when Keller,

after saying, "I am the devil," drew what the defendant thought was a .44 Magnum pistol and pointed it at him. Maselli claimed that he responded by drawing his own gun; thought, he was about to be killed, and, so thinking, fired the entire clip at Keller within several seconds.

Despite the fact that the issues of intent and self-defense were virtually the only issues before the jury, the trial court instructed not only that "Every person is presumed to intend the natural and necessary consequences of his acts," (Appendix, D) but also instructed the jury that they were to "consider the importance to the accused of the outcome of this trial" and to include in their consideration the defendant's "obvious interest in the verdict." (Appendix, D).

The jury returned a verdict of guilty of manslaughter in the first degree and the defendant was sentenced to a term of not less than ten (10) nor more than twenty years (2) in prison (Appendix, C).

The defendant appealed his conviction to the Supreme Court of the State of Connecticut and tendered, inter alia, the issue of the constitutionality of these

portions of the charge. The defendant in his brief to the Connecticut Supreme Court argued that the portion of the charge drawing attention to the defendant's interest in the outcome of the trial impermissibly singled out the defendant as a witness and discredited his testimony, thereby denying him the protection of the presumption of innocence and due process of law. He also argued that the portion of the charge regarding the presumption of intent violated this Court's ruling in Sandstrom v. Montana, 442 U.S. 510 (1979).

The Supreme Court of Connecticut reached the questions tendered, but held that the reference in the charge to the defendant's interest in the outcome was permissible in light of a long line of state cases permitting the court to "'advise the jury that in weighing the credibility of an accused's testimony they can consider his interest in the outcome of the trial.'" (Appendix, A). Justice Bogdanski wrote a dissenting opinion in which he reasoned that this portion of the charge unconstitutionally interferes with the presumption of innocence. (Appendix, A).

The Supreme Court of Connecticut also held that the rule of Sandstrom v. Montana, was not violated by the presumption of intent section of the charge because "the elaborate instructions upon intent given by the trial court sufficiently qualified the objectionable reference to the presumption as to remove the possibility of a misunderstanding on the part of the jury." (Appendix, A).

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises a Significant and Recurring Question Regarding the Constitutionality of a Criminal Jury Instruction That Has Caused Continued Conflict Among State Courts and the United States Courts of Appeals.

Both federal and state courts have held, under a variety of rationales, that an instruction singling out the defendant's interest in the outcome of the case,

as challenged here, may be fatal to the validity of a criminal conviction.[1]

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[1] See generally cases cited at 85 A.L.R. 33 especially Dunbar v. State, 159 Miss. 603, 132 So. 748 (1934) and the following state court decisions inter alia: People v. Wilkes, 2 Cal.Rptr. 594 (1960); People v. Romo, 114 Cal.Rptr. 289 (1974); Georgia: Garvin v. State, 144 Ga. App. 396, 240 S.E.2d 925 (1977); Illinois: People v. Johnson, 333 Ill. 469, 165 N.E. 235 (1929); Indiana: Garvin v. State, 255 Ind. 215, 263 N.E.2d 371 (1970); Blackburn v. State, 390 N.E.2d 653 (1979); Iowa: State v. Bester, 167 N.W.2d 705 (1969); Minnesota: State v. Underwood, 281 N.W. 2d 337 (Minn.Sup.Ct. 1979); Mississippi: Sumrall v. Mississippi, 343 So.2d 481 (Miss. S.Ct. 1977); Missouri: State v. Finkelstein, 269 Mo. 612, 191 S.W. 1002 (1917); Nevada: Graves v. State, 413 P. 2d 503 (Nev. S.Ct. 1966); New York: People v. Bell, 38 N.Y.2d 116, 378 N.Y.S. 2d 686, 341 N.E.2d 246 (1975); Rhode Island: State v. Bruyere, 110 R.I. 426, 293 A.2d 311 (1972); Tennessee: Stewart v. State, 484 S.W.2d 77 (1972); Wisconsin: Johnson v. State, 75 Wisc.2d 344, 249 N. W.2d 593 (1977).

The Seventh[2] and Eighth Circuit[3] Courts of Appeals have disapproved the instruction for a number of years. As then Circuit Judge Blackmun observed in Taylor v. United States, 390 F.2d 278, 285 (8th Cir. 1968):

> We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated

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[2] United States v. Saletko, 452 F.2d 193 (7th Cir. 1971), cert. denied 405 U.S. 1040 (1972), which incorporates views of the Eighth Circuit but does not reverse conviction.

[3] Taylor v. United States, 390 F.2d 278 (8th Cir. 1968), cert. denied 393 U.S. 869 (1968); United States v. Bear Killer, 534 F.2d 1253 (8th Cir. 1976), cert. denied 429 U.S. 846 (1976); United States v. Standing Soldier, 538 F.2d 196 (8th Cir. 1976), cert. denied 429 U.S. 846 (1976); United States v. Brown, 453 F.2d 101 (8th Cir. 1971), cert. denied 405 U.S. 978 (1972). Generally, these cases disapprove the instruction but find no prejudice significant enough to warrant reversal. But see State v. Underwood, n. 1, infra, which cites these cases as controlling and reverses conviction based on the crucial issue of credibility of the defendant's testimony to claim of self-defense, as in the case at bar.

> if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as "including the defendant", should suffice.

Similarly, the standard reference work for federal jury instructions, E. Devitt and C. Blackman, Federal Jury Practice and Instructions (3d ed. 1977) §17.12 disapprove the instruction:

> [We] do not recommend that the court point to the defendant's special interest. The instruction does not tell the jurors anything they do not already know, and seems to tell them to be careful about believing the defendant.

Rather, they recommend the neutral instruction:

> "A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness."

Despite these views and the disapproval of the instruction in at least

thirteen states,[4] many states and a majority of the federal appellate courts[5] continue to adhere to an anachronistic

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[4] See generally annotation 85 A.L.R. 33 and 1976 and 1980 updates of annotation for state court decisions; Arizona: State v. Richardson, 110 Ariz. 48, 514 P. 2d 1236 (1973); Colorado: People v. Reynolds, 194 Col. 543, 575 P.2d 1286 (1978); Connecticut: State v. Guthridge, 164 Conn. 145, 318 A.2d 87 (1972); Georgia: Mitchell v. State, 121 Ga.App. 382, 173 S. E.2d 709 (1970); New Jersey: State v. Sinclair, 57 N.J. 56, 269 A.2d 161 (1970); New Mexico: State v. Turner, 81 N.M. 450, 468 P.2d 421 (1970); North Carolina: State v. Eakins, 292 N.C. 445, 233 S.E.2d 387 (1977) requiring balancing language; Ohio: State v. Cron, 14 Ohio App. 2d 76, 236 N.E. 2d 671 (1967); Pennsylvania: Commonwealth v. Green, 251 Pa. Super. 318, 380 A.2d 798 (1977); Tennessee: Johnson v. State, 477 S.W.2d 221 (1972); Wyoming: Simms v. State, 492 P.2d 516 (1972).

[5] Second Circuit, see cases cited infra, p. 17; U.S. v. Figurski, 545 F.2d 389 (4th) Cir. 1976); U.S. v. Wiggins, 566 F.2d 944 (5th Cir. 1978); U.S. v. Palmere, 578 F.2d 105 (5th Cir. 1978), cert. denied 439 U.S. 1118 (1979); U.S. v. Eskridge, 456 F.2d 1202 (9th Cir. 1972); Rivera-Vargus v. U. S., 307 F.Supp. 1075 (D.Puerto Rico, 1969).

acceptance of this instruction citing the decision of this Court in Reagan v. United States, 157 U.S. 301 (1895)[6] as controlling.

Reagan was decided a mere seventeen years after defendants in criminal trials were first allowed to testify on their own behalf.[7] The decision in Reagan is steeped in traditional evidentiary distrust of the testimony of an accused:

> "The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility."
>
> . . . the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation;

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[6] See Hicks v. United States, 150 U.S. 442 (1893); Hickory v. United States, 160 U.S. 40 (1896).

[7] The act of March 16, 1878 (20 Stat. 30) allowed criminal defendants to, "at his own request...be a competent witness."

> and that the interest of the defendant in the result of a trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony.[8]

Reagan v. United States utterly fails to recognize the inherent paradox created by instructions which, on one hand, caution the jury to question the defendant's credibility, and instructions which, on the other hand, urge the jury to respect the presumption of innocence. Taylor v. Kentucky, 436 U.S. 478 (1978); Kentucky v. Wharton, 441 U.S. 786 (1979).

The failure of the Reagan court to appreciate this apparent conflict is understandable since Reagan predated the establishment of the presumption of innocence as the bedrock of our system of criminal law. Coffin v. United States,

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[8] It should be noted that of the seven state decisions relied on in Reagan as persuasive, five of those states, California, Iowa, Illinois, Indiana and New York, have, in recent years, disallowed the instruction.

156 U.S. 432 (1895); In re Winship, 397 U.S. 358, 361 (1970).

Since Coffin, and more dramatically in recent years, this Court has promulgated an entire body of constitutional criminal law firmly grounded on the foundation of the presumption of innocence. As Chief Justice Burger wrote in Estelle v. Williams, 425 U.S. 501 (1976):

> The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice....To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt [cite omitted].
>
> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience. (Emphasis added)

And as Justice Powell wrote in Taylor v. Kentucky, supra, at 47:

> This Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

The presumption of innocence must mean that an accused is entitled to have his guilt or innocence determined without jury consideration of extrinsic circumstances, namely, his interest in the outcome of the trial.

This Court has not ruled on the constitutionality of this instruction in over eighty years. As a result, the propriety of this instruction is continually in question; the constitutionality of the instruction is in doubt; and, generally, both state and federal courts are in disagreement and in need of guidance and direction from this Court.

The struggle of the judges of the Second Circuit Court of Appeals to deal with this instruction is illustrative of the profound confusion this eighty year

hiatus has produced. The Second Circuit seems to have developed a wholly unworkable, time-consuming "balancing" test[9] which requires case-by-case review of the language of the entire charge in each instance where the instruction is challenged. U.S. v. Stirling, 571 F.2d 708 (2d Cir. 1978) cert. denied 439 U.S. 824 (1978); U.S. v. Martin, 525 F.2d 703 (2d Cir. 1975) cert. denied 423 U.S. 1035 (1975); United States v. Floyd, 555 F.2d 45 (2d Cir. 1977) cert. denied 434 U.S. 851 (1977); United States v. Rucker, 586 F.2d 899 (2d Cir. 1978); U.S. v. Vega, 589 F.2d 1147 (2d Cir. 1978); U.S. v. Hernandez, 588 F.2d 346 (2d Cir. 1978); U.S. v. Schlesinger, 598 F.2d 722 (2d Cir. 1979) cert. denied 444 U.S. 880 (1979). The cases challenging this instruction have produced a body of law, riddled with obfuscation and conflicting rationales; the number of cases generated by this confusion underscores the need for definitive action from this Court.

Obviously, the balancing approach of

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[9] Devitt and Blackman, supra, p. 240.

the Second Circuit is not consistent with the decisions of the Supreme Court of Connecticut which baldly allow the instruction and require no balancing language. State v. Guthridge, n.4, infra.

Unlike many of the cases cited herein where certiorari has been denied, the case at bar is uniquely suited for determination of this issue. This case turns entirely on whether or not the jury believed that Maselli killed Keller in self-defense. Since Maselli was the only witness to the shooting and since his justification was self-defense, the trial court should have taken every precaution to insure that his testimony was not undermined. See Dunbar v. State, supra; State v. Underwood, supra; Estelle v. Williams, supra.

The actual conflict among the federal appellate courts and state courts regarding this instruction clearly justifies the grant of certiorari to review the judgment below. Moreover, the need to grant certiorari is enhanced by the obvious conflict between Reagan v. United States, supra, and the most recent decisions of this Court devoted to the edification of the presumption of innocence.

II

The Decision of the Supreme Court of Connecticut is in Direct Conflict With the Decision of This Court in Sandstrom v. Montana.

In Sandstrom v. Montana, 442 U.S. 510 (1979), this Court held that the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutionally shifted the burden of proof of an essential element of the crime of murder, namely intent, from the State to the defendant, thereby depriving the defendant of the protections of the presumption of innocence and due process of law.

The factual similarities between Sandstrom and Maselli are compelling; both suffer the same constitutional infirmity, and, therefore, Maselli's conviction should be set aside.

In Sandstrom and Maselli, each defendant admitted shooting the victim: Sandstrom claimed that chronic alcoholism prevented him from forming the requisite intent to "purposefully or knowingly" kill Annie Jessen, 442 U.S. 512; similarly

Maselli claims that the killing of John Keller was done in self-defense, and that he intended to save his own life by shooting Keller. (Appendix, p. 3a infra) Clearly, in both cases, intent was the sole element of the crime of murder which was in issue before the jury.

However, in both cases the trial court relieved the State of its burden of proving the element of intent by improperly charging the jury that they were free to presume the essential element of intent from other facts that had been proved. In Sandstrom the trial court unconstitutionally shifted the burden of proof by allowing the jury to presume that Sandstrom intended "the ordinary consequences of his voluntary acts"; in Maselli, the jury was told, in language virtually identical to the instruction disapproved in United States v. United States Gypsum Co., 438 U.S. 422 (1978) that "[e]very person is presumed to intend the natural and necessary consequences of his acts." (Appendix, pp. 5e, 5d infra)

Neither the Sandstrom instruction nor the Maselli instruction pass constitutional muster. These instructions allow

the jury to presume intent from proven facts; they allow the actus rea to prove the mens rea. The notion that an essential element of a crime can be presumed merely by the proof of other facts or elements was condemned more than twenty-five years ago by this Court in Morissette v. United States, 342 U.S. 246 (1952). That doctrine was given new vitality last year in United States v. United States Gypsum Co., supra. Furthermore, this Court found in Gypsum that such an instruction invaded the fact-finding function of the jury, thereby, relieving the State of its constitutional obligation to prove each and every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

And, lastly, such instructions impermissibly shift the burden of proof of an essential element of a crime from the State to the defendant in violation of the doctrines of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977).

The rationales of these cases converge in Sandstrom v. Montana, supra, to support an explicit holding that this

species of instruction -- an instruction where the jury is asked to presume intent -- is unconstitutional under the due process clause of the Fourteenth Amendment.

The petitioner tendered to the Connecticut Supreme Court the very constitutional issues decided in Sandstrom and accepted by the Supreme Court of Connecticut in State v. Harrison, Conn. (40 Conn.L.J., No. 9)(1979) and State v. Moye, Conn. (40 Conn.L.J. No. 46)(1979). The Supreme Court of Connecticut reached the question but decided that the charge in this case was permissible.

The Supreme Court of Connecticut based its decision on the fact that Maselli was convicted of manslaughter in the first degree, rather than murder, and that the trial court's instructions were "adequately qualified to avoid the possible misinterpretations found objectionable in Sandstrom." (Appendix, p. 14a infra)

The Supreme Court of Connecticut has quite simply misinterpreted the decision of this Court in Sandstrom. First of all, Connecticut has fashioned a test for Sandstrom-type problems which is totally out

of keeping with both the letter and spirit of that decision. In State v. Arroyo, Conn. (41 Conn.L.J., No. 39)(1980) the Connecticut court decided that if the court's instructions "could have been interpreted by the reasonable juror as either a conclusive or burden shifting presumption thereby undermining the jury's responsibility as factfinder",[1] then the instructions on intent would deprive the defendant of due process of law. "If on the other hand, the instructions made it clear that the jurors were permitted but not required to infer criminal intent from the defendant's conduct, then the instructions do not violate the defendant's fourteenth amendment guarantees."[2] (41 Conn. L.J., No. 39, p. 7).

This argument was made and roundly rejected in Sandstrom. 442 U.S. 514. This test is obviously at odds with Justice Brennan's crystal clear language to the contrary: "However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot dis-

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1, 2 Cites omitted.

count the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid." 442 U.S. 519 (emphasis added).

There is no language in the Maselli charge which instructs the jury on whether or not the presumption is permissive or requisite.[3] Nor is there any qualifying language in the charge relating to presumptions. Thus, the charge clearly runs afoul of this Court's decision in Sandstrom.

Furthermore, the Connecticut Supreme Court decided that because the jury had found Maselli guilty of the lesser included offense of manslaughter in the first

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[3] The Connecticut Supreme Court seems to place great emphasis on the placement of the presumption of intent language. (See State v. Arroyo, infra; but see Appendix, pp. 16a-18a.) The petitioner contends that placement is irrelevant to the unconstitutionality of the charge in the instant case.

degree, the jury obviously had considered the question of intent and had not merely presumed intent. (Appendix, p. 18a) This conclusion is logically and constitutionally erroneous. The jury's finding of guilty on the lesser included offense means only that the jury chose one form of specific intent over another form of specific intent;[4] it does not mean that they did not presume intent from proven facts. From the language of this charge, a reasonable juror could well have concluded that he was to presume either that the defendant intended to kill the victim or to presume that the defendant intended to cause serious physical injury to the victim.[5] In short, the Connecticut Supreme

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[4] An essential element of C.G.S. §53a-54a (a) is intent to cause the death of another person, while an essential element of C.G.S. §53a-55 is intent to cause serious physical injury. (Infra, pp. 3-4)

[5] Since the jury verdict was a general verdict, not specifying whether the jury relied on subsection (1) or (3) of C.G.S. §53a-55, and since the Connecticut Supreme Court decided that the jury might have relied properly upon either subsection, the question of intent remains crucial. 442 U. S. 526. (Appendix, p. 11a, infra and cases cited therein).

Court has condoned the use of an instruction that has been disapproved by this court in both United States v. United States Gypsum Co. and Sandstrom v. Montana. It is the mandate of this Court to eliminate such conflicts in our constitutional law and in our criminal courts.

The conflict between the State of Connecticut's highest court and this court justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted,

SUE L. WISE
265 Church Street
New Haven, Ct. 06510
(203) 562-9931

JOHN R. WILLIAMS
265 Church Street
New Haven, Ct. 06510
(203) 562-9931

DATED: November 14, 1980

APPENDIX A

S U P R E M E C O U R T

May Term, 1980

STATE OF CONNECTICUT v. MATTHEW MASELLI

COTTER, C.J., BOGDANSKI, PETERS, PARSKEY and D. SHEA, Js.

Argued May 13-decision released August 12, 1980

Indictment charging the defendant with the crimes of murder and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where, on motion by the state, the trials were severed and the charge of murder was tried to the jury before Grillo, J.; verdict and judgment of guilty of manslaughter in the first degree and appeal by the defendant. No error.

Joette K. Rubin, assistant public defender, with whom were John R. Williams and, on the brief, Jerrold H. Barnett, public defender, for the appellant (defendant).

Linda K. Lager, assistant state's

attorney, with whom, on the brief, were Arnold Markle, state's attorney, and John J. Kelly, assistant state's attorney, for the appellee (state).

DAVID M. SHEA, J. After a jury trial the defendant was found guilty of manslaughter in the first degree in violation of General Statutes §53a-55 as a lesser offense included in the charge of murder in violation of General Statutes §53a-54a (a). In this appeal the defendant claims error upon three grounds: (1) that the two kinds of manslaughter in the first degree submitted to the jury are not properly included in the charge of intentional murder set forth in the indictment; (2) that the charge to the jury referring to the defendant's interest in the outcome of the trial prejudiced the defendant and infringed upon his constitutional right to testify in his own behalf; and (3) that the charge upon the element of intent, which referred to the presumption that a person intends the natural consequences of his acts, violated the principles of Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979).

There is little dispute about the facts which the jury might reasonably have found, because most of the evidence concerning the bizarre circumstances of this homicide came from the testimony of the defendant.

In the early morning hours of December 10, 1975, the defendant shot and killed the driver of a taxicab which he had engaged to transport him from Stratford to visit a friend in Fairfield. The defendant was the only passenger in the cab and he fired eight bullets from a .32 caliber semiautomatic revolver at close range, six of which struck the victim in the head, face and neck. The taxicab, which had been traveling west on the Wilbur Cross Parkway in Woodbridge, hit a center guard rail and finally came to rest against a tree on the side of the highway. Except for a small cut and a minor abrasion, the defendant was not injured in the crash.

The defendant claimed that he had shot the victim in self-defense as the cab was proceeding along the highway. He testified that after an evening of discussions with several associates in his

business of promoting concerts and a quarrel with his girlfriend, he called a taxicab sometime after midnight in order to visit a friend who lived on route 59 near Fairfield. When the taxicab arrived, he sat in the front seat with the driver. Because commercial vehicles are not ordinarily permitted on the Merritt Parkway, the defendant said he was a policeman and, therefore, could use that highway.

As they proceeded east on the Merritt Parkway, the victim and the defendant engaged in a conversation. Assuming that the defendant was a policeman, the victim asked if he was armed. The defendant said he had a .32 caliber automatic. The victim said he had a .44 magnum in the cab.

After a half hour of driving easterly, the defendant noticed that they had been going in the wrong direction and had reached New Haven. The driver stopped at a phone booth and the defendant telephoned his friend and found that they should have gone westerly toward route 59 rather than easterly toward exit 59.

After the taxicab was turned around to proceed in the opposite direction the

conversation resumed. The defendant testified that the driver appeared depressed but that his own mood was optimistic. The driver said something to the effect that there was no hope for the world. The defendant remarked, "Only the devil talks like that." The driver responded, "I am the devil" and reached to his left side with his right hand to grasp what the defendant imagined was his .44 magnum. The defendant testified that when he saw the pistol in the driver's right hand pointing in his general direction, he drew his own gun, struck the driver's right hand which held the pistol and fired the entire clip of bullets in his own weapon at the victim.

An examination of the taxicab by the police at the scene disclosed a pellet air pistol capable of firing BB shot lying near the left foot of the victim. There was testimony that the victim kept such a gun in his taxicab.

I

The claim of the defendant that the court erred in charging the jury upon the lesser included offense of manslaughter in the second degree was not the subject of

any exception taken at the trial, as required by Practice Book, 1978, §315. We must, nevertheless, consider the matter because the grounds relied upon, that the indictment did not inform the defendant of this charge and that the evidence was insufficient to warrant its submission, involve a claim of deprivation of a fundamental constitutional right and a fair trial.[1] State v. Troynack, 174 Conn. 89, 98, 384 A.2d 326 (1977); State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973).

We have recently held that by virtue of General Statutes §53a-45 (c)[2] a murder indictment is deemed to notify a defendant

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1 In the converse situation, where a defendant has failed to request an instruction upon a lesser included offense at the trial and claims error in its omission upon appeal, we have held that there is no fundamental constitutional right to a jury instruction on a lesser included offense. State v. Whistnant, Conn. (41 Conn. L.J., No. 33, p. 5) (1980).

2 General Statutes §53a-45 (c) provides as follows: "The court or jury before which any person indicted for murder is tried may find him guilty of homicide in a lesser degree than that charged."

that upon the trial he may be found guilty of homicide in any lesser degree than that charged. State v. Rodriguez, Conn. (41 Conn. L.J., No. 44, p. 12)(1980). It is well established that the statement of the principal charge in the indictment or information constitutes notice of any lesser included offense. Id., 19; see Paterno v. Lyons, 334 U.S. 314, 320-21, 68 S.Ct. 1044, 92 L.Ed. 1409 (1948).

In charging upon manslaughter in the first degree as a lesser offense included in the murder indictment, the trial court instructed the jury that the defendant would be guilty of that crime (1) if with intent to cause serious physical injury to the victim he caused his death, as provided in subsection (1) of General Statutes §53a-55, or (2) if under circumstances evincing an extreme indifference to human life, he recklessly engaged in conduct which created a grave risk of death to the victim and thereby caused his death, as provided in subsection (3).[3]

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3 The trial court did not instruct upon manslaughter in the first degree as delineated in subsection (2) of General Statutes §53a-55, i.e., "with intent to cause

Despite the defendant's complex argument to the contrary, we conclude that an intention to cause "serious physical injury" would encompass the more culpable mental state of intending to inflict the ultimate damage of death upon a person. See General Statutes §53a-3 (4); Webster, Third New International Dictionary. Furthermore, we have declared in the context of homicide "that an offense that would be a lesser included offense but for its requirement of a less culpable state of mind than that required for the greater, will be deemed a lesser included offense." State v. Rodriguez, supra, 20. Manslaughter in the first degree as defined

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the death of another person, he causes the death of such person or a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection." It is not claimed that such an instruction would have been appropriate in this case.

in subsection (1) of §53a-55 is a lesser included offense in a murder indictment.

The defendant's contention that manslaughter in the first degree based upon "reckless" conduct as set forth in subsection (3) of §53a-55 is not included in a charge of murder was explicitly rejected in State v. Rodriguez, supra, 20, where we overruled State v. Troynack, supra, and distinguished State v. Ruiz, 171 Conn. 264, 269-72, 368 A.2d 222 (1976), upon which the defendant has relied. In view of General Statutes §53a-45 (c), which allows a defendant indicted for murder to be found guilty of homicide in a lesser degree than that charged, it is clear that any lesser degree of homicide may be considered by the trier, subject to the requirements of State v. Whistnant, Conn. (41 Conn. L.J., No. 33, p. 5, 8) (1980), that the evidence does support a conviction of the lesser included offense and that the elements differentiating the lesser offense are sufficiently in dispute to justify finding the defendant innocent of the greater offense but guilty of the lesser. State v. Rodriguez, supra.

The defendant has made no claim in his brief that the evidence would not support a conviction of manslaughter in the first degree under both subsection (1) and subsection (3) of §53a-55. During argument, however, the question did arise of the sufficiency of the evidence to support a finding that the defendant's avowedly intentional shooting of the victim constituted "reckless" conduct creating a grave risk of death to the victim under circumstances evincing an extreme indifference to human life, as proscribed by subsection (3).

It appears that the defendant claimed neither insanity nor extreme emotional disturbance at the trial, but sought acquittal solely upon the ground of self-defense. The trial court instructed the jury upon the use of deadly physical force in defense of the person in accordance with General Statutes §53a-19, charging that "]i]t is the facts as they reasonably appear to the defendant at the time he acted which measure the existence of the right of self-defense." The jury might well have concluded that for the defendant to have believed under the circumstances

revealed by the evidence that the victim was about to use deadly force upon him so that it was necessary to fire eight shots at point blank range was such a gross deviation from the standard of conduct that a reasonable person would observe in the situation as to constitute recklessness. General Statutes §53a-3 (13).

Since we have concluded that the court properly submitted to the jury manslaughter in the first degree in violation of both subsections (1) and (3) of §53a-55, we are not concerned with the further question which the defendant raises of the failure of the verdict to specify which of these subsections the jury relied upon. See Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); Leary v. United States, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); Sandstrom v. Montana, supra, 526. The jury might properly have relied upon either subsection in this case.

II

The defendant also neglected to assert in the trial court his claim that the reference in the charge to his inter-

est in the outcome of the trial denigrated his testimony and depreciated his constitutional right to testify. Practice Book, 1978, §315. Despite the absence of the prescribed exception, the same issue has previously been regarded as falling within the principle of State v. Evans, supra, allowing review of newly raised claims of constitutional error. State v. Mastropetre, 175 Conn. 512, 525, 400 A.2d 276 (1978).

"The rule is well settled in this state that the court may advise the jury that in weighing the credibility of an accused's testimony they can consider his interest in the outcome of the trial." State v. Guthridge, 164 Conn. 145, 151, 318 A.2d 87 (1972), cert. denied, 410 U.S. 988, 93 S.Ct. 1519, 36 L.Ed.2d 186 (1973). The charge in this case was substantially identical to that given in State v. Guthridge, supra, 151n. A majority of this court has continued to adhere to the rule. State v. Mastropetre, supra, 525; State v. Bennett, 172 Conn. 324, 335-37, 347 A.2d 247 (1977); State v. Jonas, 169 Conn. 566, 577, 363 A.2d 1378 (1975); State v.

Blyden, 165 Conn. 522, 528, 338 A.2d 484 (1973); State v. Moynahan, 164 Conn. 560, 575, 325 A.2d 199 (1973). Nothing in the defendant's presentation has persuaded us to change our view.

III

Once again we are obliged to consider a claim of error in the charge not brought to the attention of the trial court in accordance with Practice Book, 1978, §315, upon the ground that a fundamental constitutional right of the defendant was violated by the instruction upon the element of intent. State v. Arroyo, Conn. (41 Conn. L.J., No. 39, p. 6) (1980).

The trial court did include amidst several paragraphs of instructions upon intent the sentence: "Every person is presumed to intend the natural and necessary consequences of his acts." In Sandstrom v. Montana, 442 U.S. 510, 525, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979), a similar instruction, "The law presumes that a person intends the ordinary consequences of his voluntary acts," was held to be impermissible without adequate qualifying instructions to remove the possibility that a jury might interpret it as either

(1) establishing a conclusive presumption that a person intends the results of his actions, or (2) as shifting the burden of proving that element of the crime from the state to the defendant.

We have reviewed the instructions[4] upon intent given in this case and find that they were adequately qualified to avoid the possible misinterpretations found objectionable in Sandstrom. The sentence relating to the "presumption" was followed by a detailed exposition about inferring intent from circumstantial evidence. The charge upon this element of the crime was substantially similar to the charge upon that subject which was found to meet the requirements of Sandstrom in

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4 The pertinent portion of the charge upon intent was as follows:

"The third element which must be proved is that the person causing the death of the person must have done so with intent to cause the death; in other words, the state must prove beyond a reasonable doubt that the accused shot Keller with intent to cause his death.

"Now, 'intent' is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary consequences of his acts.

State v. Arroyo, Conn. (41 Conn. L.J., No. 39, pp. 6, 8)(1980). The discussion of intent was related to the principal

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"It is often impossible, and never necessary to prove criminal intent by direct evidence. Ordinarily intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference.

"A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and therein saw a certain purpose or intention.

"The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what the person's conduct was, and what the circumstances were surrounding that conduct; and from those infer what his purpose or intention was.

"A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. To draw such an inference, which was mentioned heretofore in my charge, is not only the privilege but it is also the duty of the jury; provided of course the inference drawn is a reasonable one.

"In this case, therefore, it will be a part of your duty to draw all reasonable

offense of murder, the court concluding: "In this case, therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller. If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder."

In explaining the requirement of an intention to cause serious physical injury as an element of manslaughter in the first

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inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller.

"If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder."

degree in violation of subsection (1) of §53a-55,[5] the court did not repeat its statement of the presumption condemned by Sandstrom, a circumstance found to flaw

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5 This portion of the charge was as follows:

"And so far as this case is concerned a person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person he causes the death of the person . . . .

"'Serious physical injury' means physical injury which creates a substantial risk of death.

"The court has already instructed you with reference to intent. That is an element involved in the first section of the statute relating to manslaughter in the first degree which states, 'A person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury'-and I have explained 'serious physical injury' to you-'to another person, he causes the death of such person.'

"Now, in order for the accused to be found guilty of this charge, manslaughter in the first degree, the state must prove beyond a reasonable doubt, first, that the person intended to cause serious physical injury to another person and that he caused the death of such person. That relates to the first part of the statute that I referred to which involves 'intent.'"

the manslaughter verdict in State v. Arroyo, supra, 6. The previous instructions upon intent were referred to generally, but the court did say expressly that the state must have proved beyond a reasonable doubt that the defendant intended to cause serious physical injury to another person in order to obtain a conviction of that lesser included offense. We have no doubt but that the elaborate instructions upon intent given by the trial court sufficiently qualified the objectionable reference to the presumption as to remove the possibility of a misunderstanding on the part of the jury. We are reinforced in this conclusion by the fact that in this case where the defendant admitted that he intentionally fired eight bullets at the victim, causing his death, the verdict of the jury was for a conviction of the lesser offense of manslaughter in the first degree rather than murder, the sole differentiating element between the two crimes being the requisite mental state.

There is no error.

In this opinion Cotter, C.J., Peters and Parskey, Js., concurred.

BOGDANSKI, J. (dissenting). I would find error in the trial court's charge concerning the defendant's testimony and credibility.

The defendant in this case testified on his own behalf. Thereafter the court charged the jury as follows: "You consider, as you will of any other witness the interest of the accused in the case, as you would consider that of any other person who has testified. In that connection you'll consider the importance to the accused of the outcome of this trial. In other words, what I'm trying to say is that an accused person, having taken the witness stand stands before you just like any other witness and is entitled to the same considerations and must have his testimony measured in the same way as that of any other witness, which would include your consideration of his obvious interest in the verdict." (Emphasis added.)

A defendant is presumed innocent until proven guilty; Deutch v. United States, 367 U.S. 456, 471, 81 S.Ct. 1587, 6 L.Ed. 2d 963 (1961); Coffin v. United States, 156 U.S. 481, 491, 15 S.Ct. 394, 39 L.Ed. 432 (1895); and if he does not testify, no

comment can be made upon his failure to do so. Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The charge in this case placed a penalty on the defendant's decision to testify by relegating his assertion of innocence to a less credible category of testimony than that of the state's witnesses. By creating such a circumstance, the charge under consideration substantially undermines the presumption that the accused is innocent by permitting the jury to attribute a motive to the defendant that can only attach if he is indeed guilty as charged.

"[T]he accused's right to a fair trial in a fair tribunal is the very foundation of due process. . . .'Every procedure which would offer a possible temptation to the average man. . .to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 [1927]; Estes v. Texas, 381 U.S. 532, 543, 85 S.Ct. 1628, 14 L.Ed.2d 543 [1965]." Aillon v. State, 168 Conn. 541, 546-47,

363 A.2d 49 (1975). To single out the defendant for exercising his right to testify is equally as repugnant as commenting on the exercise of his right to remain silent.

The better rule is to limit the charge to a general statement of the elements by which all witnesses' testimony should be weighed and not to single out the defendant's testimony as worth less than that of any other witness. See State v. Bennett, 172 Conn. 324, 338-40, 374 A.2d 247 (1977) (Bogdanski, J., dissenting); State v. Jonas, 169 Conn. 566, 578-80, 363 A.2d 1378 (1975)(Bogdanski, J., concurring and dissenting). See, e.g., United States v. Brown, 453 F.2d 101, 107 (8th Cir. 1971), cert. denied, 405 U.S. 978, 92 S.Ct. 1205, 31 L.Ed.2d 253 (1972); Garvin v. State, 255 Ind. 215, 217-22, 263 N.E.2d 371 (1970); State v. Bester, 167 N.W.2d 705, 706-10 (Iowa 1969); Hall v. State, 250 Miss. 253, 265-67, 165 So.2d 345 (1964); State v. Finkelstein, 269 Mo. 612, 618-22, 191 S.W. 1002 (1917); Graves v. State, 82 Nev. 137, 138-42, 413 P.2d 503 (1966); Stewart v. State, 484 S.W.2d 77, 79 (Tenn. Crim. App. 1972); and cases cited at 85

A.L.R. 577; see also Bryson v. State, 291 So. 2d 693 (Miss. 1974); State v. Bruyere, 110 R.I. 426, 293 A.2d 311 (1972).

I would therefore find error, set aside the judgment and order a new trial.

APPENDIX B

NO. 8674

State of Connecticut — SUPREME COURT

vs. — STATE OF CONN.

Matthew Maselli — Sept. 18, 1980

O R D E R

The Defendant's Motion to Reargue having been presented to the Court it is hereby

ORDERED Denied.

By the Court,

Donald H. Dowling
CHIEF CLERK OF
SUPREME COURT

APPENDIX C

STATE OF CONNECTICUT

No. 20838

STATE OF CONNECTICUT SUPERIOR COURT

vs. NEW HAVEN COUNTY

MATTHEW MASELLI MAY 23, 1977

PRESENT, Hon. Anthony E. Grillo, Judge.

JUDGMENT

Upon an indictment laid before the Grand Jurors of New Haven, duly impanelled and sworn by Arnold Markle, Esquire, Attorney for the State, within and for said County on December 24, 1975 charging Matthew Maselli with the crimes of Murder and Carrying pistol without permit, and thence to January 7, 1976 when the Court (Mulvey, J.) granted the Motion of the defendant filed January 2, 1976 to reduce bond, and reduced the bond to $75,000., and thence to January 23, 1976 when the defendant filed a Motion to have counsel present at Grand Jury Hearing, Motion to have minutes of Grand Jury hearing transcribed, Motion to suppress statement of defendant, Matthew Maselli, and thence to January 26, 1976 when the Court (O'Brien, J.) denied said Motions, and when the

Court (O'Brien, J.) granted the Motion of the defendant filed January 23, 1976 to exclude defendant from Grand Jury room during taking of evidence, and when said Grand Jurors on January 26, 1976 endorsed a true bill as to the crime of Murder, as more fully appears by said Bill of Indictment, as on file, and thence to February 10, 1976 when the defendant appeared before this Court and for plea said Not Guilty to both counts of said indictment, and elected to be tried by a Jury of 12 on the first count, and to be tried by a Jury of 6 on the second count, and thence to March 16, 1976 when the Court (Mulvey, J.) denied the Motion of the defendant filed February 9, 1976 to reduce bond, and thence to March 30, 1976 when the Court (Mulvey, J.) granted in part the Motion of the defendant filed March 22, 1976 for disclosure, production, inspection and examination, and thence to April 2, 1976 when a Discovery was filed as ordered by the Court, and thence to April 27, 1976 when the Court (Santaniello, J.) granted the Motion of the defendant filed April 21, 1976 to reduce bond, and reduced the

bond to $50,000., and thence to December 23, 1976 when the Court (O'Brien, J.) granted the Motion of the defendant filed December 23, 1976 to direct Clerk to subpoena military and medical records, and thence to January 20, 1977 when the Court (Grillo, J.) granted the oral Motion of the State to sever counts for trial, and denied the oral Motion of the defendant for mistrial, and thence to February 1, 1977 when the defendant filed a Motion for a directed verdict, which Motion the Court (Grillo, J.) denied, and thence to February 4, 1977 when all the evidence having been submitted, said first count of said information was committed to the Jury who returned a verdict of Guilty to lesser included offense of Manslaughter in the 1st Degree at 4:10 p.m., which verdict was accepted and ordered recorded by the Court, and when the Court (Grillo, J.) granted the oral Motion of the State to increase the bond and increased bond to $100,000., and thence to February 7, 1977 when the defendant filed a Motion to set aside said verdict, and thence to February 22, 1977 when the Court (O'Brien, J.)

granted the Motion of the defendant for commitment under Sec. 17-244, and when said defendant was committed to the diagnostic Unit of Connecticut Valley Hospital not to exceed 60 days, and thence to March 31, 1977 when the Court (Grillo, J.) granted the Motion of the State for return of victim's property, and thence to April 25, 1977 when a report from Dr. Francisco Quintana, psychiatrist, was filed, and when the prisoner appeared before this Court for sentence, and when the Court imposed the following sentence:

> Not less than ten, nor more than twenty years in the Correctional Institution, Somers, on condition that he be evaluated for psychiatric treatment,

and thence to May 11, 1977 when the defendant filed a Motion to vacate said judgment, and thence to the present time when the parties appeared and were heard by the Court, and when the Court denied the Motion filed February 7, 1977 to set aside said verdict and granted the Motion to vacate the judgment and vacated the judgment entered April 25, 1977 and entered a new judgment.

Whereupon it is adjudged that said prsioner suffer imprisonment in the Correctional Institution, Somers, for a term of not less than ten, nor more then twenty years, on condition that he be evaluated for psychiatric treatment.

BY THE COURT,
Leonard J. Gilhuly
Assistant Clerk

APPENDIX D

FEBRUARY 2, 1977

RELEVANT PORTIONS OF CHARGE TO JURY

Defendant's Interest in Outcome

"Now, in that regard an accused person is not obligated to take the witness stand in his own behalf unless he wishes to; on the other hand he has a perfect right to take the witness stand in his own behalf -- as this accused has seen fit to do. Whereas, as here, an accused person does take the witness stand to testify in his own behalf you apply to his testimony the same standards by which you determine the testimony of any other witness.

You consider, as you will of any other witness the interest of the accused in the case, as you would consider that of any other person who has testified. In that connnection you'll consider the importance to the accused of the outcome of this trial.

In other words, what I'm trying to say is that an accused person, having taken the witness stand stands before you just like any other witness and is entitled to the same considerations and must

have his testimony measured in the same way as that of any other witness, which would include your consideration of his obvious interest in the verdict."
Tr. pp. 709-710.

Essential Elements of Crimes Charged

"Because of that rule I must explain to you the law and the elements of each type, of each of the types of homicide forbidden by our Statutes. Our Statute concerning murder, insofar as pertinent to this case reads in part as follows: "A person is guilty of murder when, with intent to cause the death of another person he causes the death of such person." There are three essential elements in the crime of murder; first, the death of one person must be caused by another person; secondly, the person causing the death must be of sound mind, that is, legally sane; and third, the person causing the death of the person must have done so with intent to cause the death.

The first element, namely the death of one person must be caused by another person lies at the basis of the crime of murder. You must find that to have occur-

red as a fact. In order to convict this accused of a crime of murder you must find, first of all, that the accused caused the death of John Keller, the person named in the indictment. You must find proven beyond a reasonable doubt that John Keller died as a result of the shooting by him by the accused, if you find that the accused did shoot him.

If you find that John Keller so died then you will have found that the accused caused his death. This is the first thing that must be considered by you.

The second element which the State must prove is that at the time of the death of John Keller the accused, the person causing his death was of sound mind, that is, legally sane; that is, a person is of sound mind, legally sane and responsible for his criminal or unlawful conduct if, at the time of such conduct he does not, as a result of mental disease or defect lack substantial capacity either to appreciate the wrongfulness of his conduct, or conform his conduct to the requirements of the law.

Now, as far as that's concerned keep

this in mind: There's no claim here by the defendant that he was insame or mentally ill. Keep in mind also that it is true that the burden of proving an accused is of sound mind is upon the State; it is also true that because most men are of sound mind the law presumes that an accused was of sound mind at the time of the incident in which the charge is based, unless there is some credible evidence tending to prove the contrary, which has been introduced.

In this case, as I recall the evidence no such evidence was introduced. But as I said earlier your recollection of the evidence controls.

The third element which must be proved is that the person causing the death of the person must have done so with intent to cause the death; in other words, the State must prove beyond a reasonable doubt that the accused shot Keller with intent to cause his death.

Now, "intent" is a mental process. A person's intention may be inferred from his conduct. Every person is presumed to intend the natural and necessary conse-

quences of his acts.

It is often impossible, and never necessary to prove criminal intent by direct evidence. Ordinarily intent can be proved only by circumstantial evidence, as I have explained that term to you. What a person's purpose or intention has been is necessarily very largely a matter of inference.

A person may take the stand and testify directly as to what his or her purpose or intention was, and that testimony you can believe or not according to whether or not it warrants belief. But no witness can be expected to come here and testify that he looked into another person's mind and therein saw a certain purpose or intention.

The only way which a jury can determine what a person's purpose or intention was at any given time, aside from that person's own testimony, is by determining what the person's conduct was, and what the circumstances were surrounding that conduct; and from those infer what his purpose or intention was.

A person acts intentionally with

respect to a result or to conduct described by a Statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. To draw such an inference, which was mentioned heretofore in my charge, is not only the privilege but it is also the duty of the jury; provided of course the inference drawn is a reasonable one.

In this case therefore, it will be a part of your duty to draw all reasonable inferences from the conduct of the accused in the light of the surrounding circumstances as to what purpose or intention was in his mind at various times. In order for the accused to be found guilty of the charge of murder you must find beyond a reasonable doubt that he had an intent to cause the death of John Keller.

If you do not find beyond a reasonable doubt that the accused had that intent then he is not guilty of murder.

As I explained to you previously, any person indicted for murder may be found guilty of homicide in a lesser degree than that charged. So that brings us to a consideration of the elements involved

in manslaughter in the first degree. And so far as this case is concerned a person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury to another person he causes the death of that person; or when he, under circumstances evincing an extreme indifference to human life recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

"Serious physical injury" means physical injury which creates a substantial risk of death.

The Court has already instructed you with reference to intent. That is an element involved in the first section of the Statute relating to manslaughter in the first degree which states, "A person is guilty of manslaughter in the first degree when, with intent to cause serious physical injury" -- and I have explained "serious physical injury" to you -- "to another person, he causes the death of such person".

Now, the other part of the Statute reads, "Or when he, under circumstances

evincing an extreme indifference to human life recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person".

Now, in order for the accused to be found guilty of this charge, manslaughter in the first degree, the State must prove beyond a reasonable doubt, first, that the person intended to cause serious physical injury to another person and that he caused the death of such person. That relates to the first part of the Statute that I referred to which involves "intent".

Now, a person may also be guilty of manslaughter in the first degree if the State proves beyond a reasonable doubt, first, that the accused's conduct evinced an extreme indifference to human life; second, that the accused's conduct created a grave risk of death to another person; third, that the accused caused the death of John Keller; and fourth, that the death of John Keller was caused by the reckless conduct of the accused. There's no element of specific intent involved in this section of the Statute relating to man-

slaughter in the first degree. The gist of the charge is recklessness.
Tr. pp. 711-718.